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No. _____

In the Supreme Court of the United States

CITY OF CINCINNATI,
MILTON R. DOHONEY, JR., AND JOEL KOOPMAN,
Petitioners,

v.

MARK MILLER, COALITION OPPOSED
TO ADDITIONAL SPENDING & TAXES,
AND WEDEMANDAVOTE.COM,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The government of the City of Cincinnati is centered in City Hall. City Hall is a workplace for the City's elected officials, appointed executives, and their staff. The City's chief executive has issued Administrative Regulation No. 5, which governs the use of the interior spaces of City Hall including for assemblages, such as meetings or press conferences. This regulation permits City officials to arrange for any appropriate use of the interior spaces of City Hall for assemblages including those with non-governmental entities with whom the City official has been collaborating. The interior spaces of City Hall are not available for use by private parties.

The Sixth Circuit's decision in this case opens the workplace of City Hall to impermissible intrusion by third parties. Third parties have always had access to the exterior steps of City Hall and the areas around the building. But access to the interior of City Hall - those spaces used by elected officials and the City's public employees to conduct the work of government – has been limited to City officials and those entities with whom a City official is collaborating. The City's regulation of the use of the interior spaces of City Hall allows City officials to use their workplace appropriately while allowing ample alternative channels for the public to engage in expressive conduct. Throwing open the doors of City Hall to the general public will chill the speech of the City's officials.

The Sixth Circuit's decision raises the following questions:

1. The use of the interior spaces of the City Hall workplace, a nonpublic forum, is limited to City officials and their third party collaborators and only for those uses that are consistent with the officials' rights and responsibilities under the City's Charter. Is this limitation reasonably related to the purpose of the City Hall workplace?

2. When City officials collaborate with third parties and that collaboration leads to an arranged assemblage in the City Hall workplace, a nonpublic forum, is the communicative message expressed at the assemblage government speech?

3. The administrative regulation governing the use of the interior spaces of City Hall limits proper uses to those that are within the rights and responsibilities specified in the City's Charter to the respective City official. Does this administrative regulation provide an objective line in the law from which a person of ordinary intelligence could identify the applicable standard?

PARTIES TO THE PROCEEDING

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Respondents (plaintiffs and appellees below):

MARK MILLER; COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES; AND WEDEMANDAVOTE.COM

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CITATIONS FOR OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals is reported as *Miller et al., v. City et al.*, 622 F.3d 524 (6th Cir. 2010). App. A. The order of the Court of Appeals denying the defendants' petition for rehearing en banc was not reported. App. C. The District Court's order granting plaintiffs' motion for preliminary injunction is reported as *Miller et al., v. City et al.*, 709 F. Supp. 2d 605 (S.D. Ohio 2008). App. B.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its original decision on September 24, 2010. The Court of Appeals denied the petitioners' request for a rehearing on banc on November 24, 2010. 28 U.S.C. 1254 confers jurisdiction on this Court to review on a writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

UNITED STATES CONSTITUTION AMENDMENT I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION AMENDMENT V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION AMENDMENT XIV (Section One):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Like thousands of local governments, the government of the City of Cincinnati centrally houses its senior legislative, executive, and administrative officials in a building, in this case City Hall. City of Cincinnati officials maintain their offices and staffs in City Hall and they use areas within City Hall to help fulfill their public duties. Although it is explicitly expressed in the City's administrative regulation challenged in this case, but not mentioned in the Sixth Circuit's decision, private parties may without limit assemble and conduct their own private rallies and other events on the exterior front steps of City Hall thereby communicating a powerful and symbolic message that their concerns relate directly to the City of Cincinnati. The plaintiffs in this case have repeatedly done just that.

The interior of City Hall is expressly reserved for use by City officials for matters related to fulfilling their professional public obligations. The challenged administrative regulation expressly provides that the interior of City Hall is not generally available for private use by members of the public. Not surprisingly, indeed as expected, City officials exercising their own discretion sometimes collaborate with private parties for purposes of fulfilling the official's public obligations. It troubles the plaintiffs, and apparently the Sixth Circuit, that City officials have discretion to decide how and when to collaborate with private parties for an array of public purposes including the welfare of the City's own employees.

Zeroing in on the discretion necessarily allowed City officials, the Sixth Circuit misapprehended and

misapplied important First Amendment principles related to guarding against the risk of government censorship of private speech intended for expression in either public fora or private property. However, this Court has never applied those particular First Amendment principles to a nonpublic forum. Nor has this Court even suggested that it would do so. The Sixth Circuit's limited analysis is doctrinally inconsistent with the logic and precedent previously communicated by this Court. The *Miller* decision subjects all governmental entities within the Sixth Circuit to the imposition of private use of nonpublic fora even though the governments do not intend to make their workplaces generally available for private use.

The City and the Plaintiffs (or "COAST") negotiated Joint Stipulations of Fact "to develop a factual record for [the district court] prior to the Preliminary Injunction hearing . . . ."[1] On September 9, 2008, the City Manager adopted the current Administrative Regulation No. 5 to regulate use of the interior spaces of City Hall.[2] The City Manager is the chief executive and administrative officer of the City of Cincinnati and is responsible for the day-to-day operations of the City of Cincinnati.[3]

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[1] Joint Stipulations of Fact, App. D.

[2] App. D, 71a at para. 1.

[3] App. D, 96a at para. 63.

Administrative Regulation No. 5 provides:

Interior of City Hall

City Hall is lawfully dedicated for the purpose of allowing City officials to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati. City Hall has one primary entrance on Plum Street for ingress and egress and a second entrance in the courtyard that is wheelchair accessible. The entrances to City Hall are staffed by armed security guards. City Hall is open from 8:00 a.m. – 5:30 p.m.

The interior spaces of City Hall are reserved for use by the Mayor, City Manager and his assistants, City Councilmembers, City Department Directors, City Commissions and Boards, and City employees. The interior of City Hall is open to the public for purposes of visiting City offices and attending City Council and other public meetings. The interior of City Hall is not generally available to the public for other purposes.

When the Mayor, City Manager and his assistants, City Councilmembers, City Department Directors, and City Commissions and Boards intend to use interior spaces of City Hall for assemblages, they should notify the Facilities Management Division of the Public Services Department. That notice should be provided as far in advance of the intended use as reasonably practicable.

Facilities Management is responsible for insuring that the assemblage does not create security problems, unreasonably interfere with ingress or egress from City Hall, or otherwise unreasonably interfere with other official uses occurring inside City Hall.

City Hall Grounds

City Hall grounds includes the property surrounding the City Hall building up to and bounded by the public sidewalks on Plum Street to the east, Central Avenue to the west, Ninth Street to the north, and Eighth Street to the south.

The public and City officials may use City Hall grounds for lawful assemblages. For purposes of protecting the security of people and property in City Hall, and avoiding undue interference with the official business occurring inside City Hall, any person or entity desiring to use City Hall grounds for a lawful assemblage should submit notice, in writing, to the Facilities Management Division of the Public Services Department at least ten days prior to the proposed assemblage. The notice should include the following information about the assemblage: identification of sponsor; date and time; duration and type of event; area of City Hall grounds; approximate number of persons expected to attend; amplification equipment. City Hall grounds may not be used for commercial events conducted for private profit.

Adjacent Public Sidewalks

> The public sidewalks adjacent to City Hall grounds are open to the public for all lawful purposes.

The City Manager subsequently clarified that Administrative Regulation No. 5 prohibits use of the interior lobby and interior front steps of City Hall for assemblages because they "may interfere with normal business occurring within my office and other nearby offices, blockage of ingress and egress into and out of City Hall and from the first floor to the second floor, and the presence of armed security in the lobby."[4] Notwithstanding the City's express reservation in Administrative Regulation No. 5 of the use of the interior of City Hall for its government officials, COAST desires to use the interior of City Hall "for communicative activities without the necessity of associating with a City-connected sponsor or user or otherwise 'politically or administratively collaborating' with someone authorized by the City to arrange for such use for communicative activities."[5]

There is no evidence in the stipulated record that private individuals have ever been permitted independent access to hold assemblages in the interior of City Hall. From February 3, 1997, to the date the Stipulations of Fact were filed on October 21, 2008, *City officials* had arranged or requested space in City

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[4] App. D, 71a at para. 1, Exhibit C.

[5] App. D, 99a at para. 75.

Hall for some uses for which various private individuals and organizations also *participated*.[6]

The only reason the City did not approve COAST's requested unilateral use of the interior of City Hall on two occasions under the prior regulation was because COAST "lacked a political or administrative collaboration with one of the designated City officials authorized to arrange for such use."[7] On those occasions, COAST unilaterally conducted its rally/press conference on the exterior front steps leading into City Hall.[8] The parties' Joint Stipulation of Facts includes photographs of COAST's rallies in front of City Hall.[9]

Procedural History

On August 15, 2008, COAST filed a complaint against the City of Cincinnati and, in their official capacities only,[10] City Manager Milton Dohoney, and Joel Koopman, Facilities Manager for the City of Cincinnati Division of Facilities Management (collectively, "the City"). The complaint alleged, among other things, that COAST had a constitutional right to unilaterally use the interior of City Hall for its own purposes and that the City's regulation of the use

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[6] App. D, 73a at para. 7.

[7] App. D, 88a at para. 32.

[8] App. D, 89a at para. 33.

[9] App. D, 89a at para. 33, Exhibit Z.

[10] App D, 96a at para. 66.

of the interior of City Hall was unconstitutional. COAST contemporaneously filed a motion for temporary restraining order and preliminary injunction. COAST clearly stated its objective: "[T]he holding of a press conference and rally in the forum of the steps *inside* of City Hall would, at both the commencement and conclusion of the petition drive, be akin to the storming of the Bastille—the victory of the people over both tyranny and the arbitrary abuse of power by government officials."[11]

On August 19, 2008, the district court denied, in part, and granted, in part, COAST's motion for injunctive relief. On September 5, 2008, COAST filed an amended complaint. The City Manager adopted current Administrative Regulation No. 5 on September 9, 2008.

On November 19, 2008, the district court issued its order granting COAST's motion for preliminary injunction and denying the City's motion to dismiss. The district court broadly enjoined the City: "[T]he Court enjoins Defendants from applying Administrative Regulation No. 5 to requests for use of the interior of City Hall."

On December 3, 2008, the City timely filed its notice of appeal to the Sixth Circuit Court of Appeals. On November 17, 2009, the Sixth Circuit heard oral arguments in the case. On September 24, 2010, the Sixth Circuit held that the district court correctly held "that the plaintiffs have established a substantial

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[11] COAST's Motion for Temporary Restraining Order and Preliminary Injunction, p. 9 (emphasis in original).

likelihood of success on two of their four claims on which they based their motion: that the City's regulation violates the plaintiff's right to free speech and that it is unconstitutionally vague. We therefore affirm."[12] On November 24, 2010, the Sixth Circuit denied the City's Petition for Rehearing En Banc.

This Petition followed.

REASONS FOR GRANTING CERTIORARI

This case raises the question of whether or not it is consistent with the free speech protections afforded by the First Amendment for a municipality to permit its own City officials to use their workplace for communicative activities, sometimes in collaboration with third parties, and exclude all non-collaborating third parties from the same space. The Sixth Circuit erred in finding that the collaboration between City of Cincinnati officials and third parties converted the interior of City Hall into a designated or limited public forum. The interior of City Hall is a non-public forum and City officials using the space for communicative activities, when collaborating with third parties and otherwise, are engaged in protected government speech not subject to First Amendment restrictions.

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[12] *Miller, et al. v. City of Cincinnati, et al.*, 622 F.3d 524 (6th Cir. 2010). App. A, 3a.

The Sixth Circuit's determination that the City's Administrative Regulation No. 5 is not reasonably related to the purpose of the forum is inconsistent with the analyses of the First and Fourth Circuits in *Del Gallo* and *ACLU*.

In *Arkansas Educational Television Commission v. Forbes*,[13] this Court stated:

> The *Cornelius* distinction between general and selective access furthers First Amendment interests. By recognizing the distinction, we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all.

In contrast, the Sixth Circuit invites the City to eliminate collaborative expressive conduct in the City Hall workplace:

> Of course, the City could altogether close the interior spaces of city hall to expressive activities by private groups if it chose to do so.[14]

The Sixth Circuit's suggestion that City officials face an all-or-nothing choice is doctrinally inconsistent with longstanding Supreme Court precedent. This Court has consistently encouraged government to open its property to *some* expressive speech without

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[13] 118 S. Ct 1633, 1642 (1998).

[14] *Miller et al., v. City et al.*, 622 F.3d 524, 535 n. 2 (6th Cir. 2010). App. A, 18a.

requiring that the government open its property to *all* expressive speech. Under the City's Administrative Regulation No. 5, City officials have the freedom to communicate messages from their City Hall workplace that have been developed in collaboration with third parties. The Sixth Circuit's decision in this case brings that process to an end.

Unlike the Sixth Circuit, the First and Fourth Circuits paid heed to the cautionary words expressed in *Arkansas Educational Television*. In *Del Gallo v. Parent*,[15] the First Circuit considered whether a postal service regulation that prohibited campaigning for election to public office on its sidewalks but permitted other forms of expressive activity violated the First Amendment. The *Del Gallo* court concluded that the post office sidewalk was a nonpublic forum. Engaging in an extensive analysis of the reasonableness of the limitation on access, the court held:"The reasonableness standard for a viewpoint-neutral restriction in a non-public forum 'is not a particularly high hurdle[,]'" and further cautioned that the reasonableness of the regulation should not be judged solely by reference to the plaintiff's particular activity, but also considered in light of the effect on all such affected premises, in that case, post offices across the country.

In *ACLU v. Mote*,[16] the Court considered a University of Maryland policy governing the use of the campus by non-students. The policy provided two areas in which non-students could engage in speech

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[15] 557 F.3d 58 (1st Cir. 2009).

[16] 423 F.3d 438 (4th Cir. 2005).

activities, subject to satisfaction of the registration requirements. The remaining areas of the campus were closed to non-students for purposes of engaging in speech activities unless the non-student was able to obtain the sponsorship of a student or student organization. With such a sponsorship, the non-student was afforded the same access to campus facilities as the sponsor.

In *ACLU,* the plaintiff was a Lyndon Larouche supporter and sought access to the two areas on campus designated for non-student speech activities. Plaintiff was not able to reserve use of the space because all areas had been previously reserved by others. Nevertheless, plaintiff attempted to distribute leaflets without abiding by the registration requirements and without obtaining a sponsor. He was subsequently cited by campus police.

Upon review of the policy, the Fourth Circuit determined that the campus was a limited public forum and that the policy was an external standard. The Fourth Circuit further determined that the policy was viewpoint neutral and then considered whether the policy was reasonable in light of the purpose of the forum. The court stated:

> The purpose of the University is clearly to provide a venue for its students to obtain an education, not to provide a venue for expression of public views that are not requested or sponsored by any member of the campus community. While it is obviously true that there could be similarities in the content of speech by an outsider and a member of the campus

> community, that does not require them both to be treated the same.[17]

In support of his position, the Plaintiff cited *Metromedia v. Greenville-Spartanburg Airport Dist.*,[18] which involved a total ban on the placement of newspaper racks. The Court distinguished *Metromedia,* stating: "This case does not involve a total ban of speech by the general public, it merely involves a time, place, and manner restriction."[19] In finding the limitation both viewpoint neutral and reasonable in light of the purpose of the forum, the Court held:

> The University policy does not deny unsponsored outsiders access to its campus, but instead merely requires them to reserve a spot which they may do as much as five days in advance, and then speak or distribute leaflets in that part. We especially note the places for speaking or handbilling are the most visited on the campus, a distinct advantage to the speaker or handbiller. If outsiders desire to leaflet or give a speech in another area of campus, they must simply find a sponsor, and they can perform these activities anywhere on the campus. We have previously recognized that universities have limited resources, which they have an interest in reserving for members of the university community. If the University opened

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[17] *Id.* at 444.

[18] 991 F.2d 154 (4th Cir. 1993).

[19] *ACLU*, 423 F.3d at 445.

> its entire campus to all members of the unaccompanied public, it would have to utilize a greater amount of those resources by, for instance, dispersing the limited staff throughout the campus to supervise the events. We are of opinion that this simple requirement of a sponsor is reasonable.[20]

In contrast, the Sixth Circuit, after determining that the City Hall workplace is "at most" a limited public forum (and conceding that limited public fora and nonpublic fora require the same analysis for First Amendment purposes) and identifying that the "stated" purpose of the City Hall forum is "to allow City officials to exercise their rights and responsibilities under the city Charter,"[21] summarily concluded that Administrative Regulation No. 5 is unreasonable. After finding the regulation viewpoint neutral, the court failed to identify and apply any objective criteria by which to determine whether or not the regulation was reasonably related to the purpose of the forum. Ignoring the extensive framework for reasonableness analysis established by *Cornelius*, the Sixth Circuit summarily and erroneously concluded that the regulation was not reasonably related to the purpose of the forum.

Cornelius holds: "[T]he reasonableness of the government's restriction of access to a nonpublic forum must be assessed in the light of the *purpose* of the

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[20] *Id.* (citations omitted).

[21] *Miller*, 622 F.3d at 536. App. A, 18a.

forum and *all the surrounding circumstances*."[22] This Court further opined that the restriction on access need only be reasonable and not "the most reasonable or the only reasonable limitation."[23] Thus, in order to properly analyze whether the City's restriction is reasonably related to the purpose of the forum, the Sixth Circuit was required to identify the purpose of the forum and assess the nexus between that purpose and "all the surrounding circumstances."

On its face, Administrative Regulation No. 5 is reasonably related to the purpose of the City Hall forum. City Hall is a workplace. Administrative Regulation No. 5 governs the use of the *interior* of the City Hall workplace by designated City officials and only for those purposes that are consistent with their rights and responsibilities, as established by the City's Charter. This requirement establishes an objective line in the law. The Sixth Circuit's determination that the requirement "as drafted, bears little relationship to any official duties under the City Charter" is inconsistent with the plain language of the regulation itself.

Because Administrative Regulation No. 5, on its face, is clearly reasonably related to the purpose of the forum, the Sixth Circuit's contrary determination must derive from facts in the record. This case was presented to the district court on a stipulated record.[24]

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[22] *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., et al.*, 105 S. Ct. 3439, 3453 (1985) (emphasis added).

[23] *Id.* at 3452.

[24] App. D.

The Joint Stipulations set forth over a hundred paragraphs and subparagraphs relating to the application and interpretation of both versions of Administrative Regulation No. 5. The Joint Stipulations contain no statements that support a finding that City officials open spaces to private parties for events they do not assist in organizing. Indeed, quite the opposite; the Joint Stipulations[25] expressly state that third parties may *participate* in assemblages in the interior spaces of City Hall only after they have *collaborated* with the individual organizing the assemblage at issue.

The collaboration at issue in this case does not convert the City Hall workplace into a forum that is available for use by third parties for their private purposes. In each instance where private parties have *participated* in an expressive activity organized by a government official, the private parties have engaged the political process and collaborated with the individual government official organizing the activity. Those who are unsuccessful at collaborating with government officials (or who choose not to collaborate) are not permitted unfettered use of City Hall. *Arkansas Educational Television*[26] upheld the exclusion of a third party candidate from a televised debate on the basis that the candidate had generated no appreciable public support. COAST was unwilling to obtain the requisite support to participate in expressive activity in City Hall. *Arkansas* held that this is a legitimate and sufficient criteria by which to

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[25]App. D, 85a at para. 18, 86a at para. 22, 99a at para. 75.

[26] 118 S. Ct. 1633 (1998).

limit access to a nonpublic or limited public forum. Within the category of proper uses, a City official has discretion on whether or not to collaborate with a private party. In both *National Endowment for the Arts v. Finley*[27] and in *Arkansas Educational Television*, this Court upheld the government's preference between speakers so long as the distinctions were drawn on reasonable and viewpoint neutral bases.

Cincinnati City Hall is a nonpublic forum. There is no permitting system, and third parties do not have access to use the interior spaces for their own purposes. Any discretion afforded City officials under Administrative Regulation No. 5 is discretion to determine which messages to adopt as their own speech and does not regulate access to a forum for private parties to communicate their own private speech. The regulation very clearly limits the discretion of City officials' use of the spaces within City Hall to uses within their rights and responsibilities under the City Charter. Accordingly, City officials' use of the spaces within City Hall for communicative activities are subject to this restriction, which represents an objective line in the law defining the proper use of the space. Further Appellees have any number of other fora in which to communicate their message to the world, including on the outside steps of City Hall where they can and often do hold rallies and press conferences. As in both *Del Gallo* and *ACLU*, the regulation of the interior spaces of City Hall is viewpoint neutral, reasonable in light of the purpose of the forum and provides ample alternative channels for

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[27] 118 S. Ct. 2168 (1998).

expressive conduct. Administrative Regulation No. 5 is consistent with First Amendment forum analysis principles.

The speech analyzed in this case, by government officials and their third party collaborators, is government speech that is not subject to First Amendment scrutiny.

The Sixth Circuit decision presents a conflict with this Court's *Summum*[28] decision. First and foremost, City Hall is a workplace housing the City's legislative body, the Council, the offices of the City's Mayor and the City Manager, the chief executive of the City, and the City's administrative and departmental directors and staff. The duties of each city official varies widely and the nature of their collaboration with third parties is very much dictated by their duties under the City's Charter. The City's elected officials may collaborate with third parties in order to garner support for a piece of legislation or a call to action in the community, the City's administration may collaborate with third parties in order to attract businesses or conventions to the City, and all City officials have an interest in collaborating with third parties in order to keep abreast of the important issues affecting the citizenry. Where such collaboration leads to an expressive event, such as a press conference, City officials appropriately use their City Hall workplace for such events. This is government speech and the Sixth Circuit erroneously subjected this speech to First Amendment scrutiny.

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[28] *Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125 (2009).

As this Court held in *Summum*, a government entity "is entitled to say what it wishes;" "to select the views that it wants to express;" and it "is the very business of government to favor and disfavor points of view."[29] "Indeed, it is not easy to imagine how government could function if it lacked this freedom."[30] And this Court further cautioned: "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed."[31]

This Court notably reiterated in *Summum* that: "A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."[32] And: "[W]here the government controls the message, 'it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources.'"[33]

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[29] *Id.* at 1131 (citations omitted).

[30] *Id.*

[31] *Id.*, quoting *Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13 (1990).

[32] *Id.*

[33] *Id.*, quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005).

But this Court went further than simply reaffirming *Johanns*.[34] *Summum* extensively analyzes the different messages or meanings that can be conveyed by a single monument such that, even where the government controls each and every word on the monument, the government's message may not be readily apparent to every observer. Nevertheless, the monument falls within the scope of government speech. If speech where the message is imprecise and open for interpretation may be characterized as government speech, certainly speech where the government's message is clear but the government hasn't controlled each and every word of the message must also be government speech. Thus, where the government collaborates with a third party to accept a monument and display it to the public, the government controls the content of the text of the monument but need not necessarily control the message in order for the monument to be considered "government speech" within the meaning of *Summum*. Where the government collaborates with third parties to express support for or against a legislative enactment or call to action and the government controls the overarching message, even where the government does not control every word expressed by a third party in support of the message delivered from the interior of City Hall, the expression is still government speech.

The Sixth Circuit misapprehended the stipulations made by the parties and their applicability to *Summum*. The Sixth Circuit contends, "Historically, governments have exercised strong 'editorial control over donated monuments,' while private individuals

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[34] *Id.* at 1135.

can apparently access the interior of Cincinnati's city hall for assemblages on the whim of any authorized official."[35] The Sixth Circuit's use of the word "whim" distorts the *discretion* that City officials necessarily exercise in determining with which third parties each will collaborate. The discretion to determine which message to convey is an essential component of governing. But the Sixth Circuit's fundamental misapprehension is in its limited reading of *Summum*. The predominant concepts in *Summum* are identical to those in this case. Government officials are entitled to choose what they express, how they express it, and with whom they choose to collaborate. *Summum* explicitly provides government officials with these rights and the Sixth Circuit failed to analyze Administrative Regulation No. 5 in this context.

The issue of government speech inside City Hall is material to the determination of the lawfulness of the City's limitations on public access to City Hall spaces. Private parties like COAST cannot bootstrap themselves into City Hall and create parity with duly elected and appointed government officials. COAST's case is predicated upon the supposition that when public officials expressively collaborate with private parties on matters of public interest, that expression is private speech rather than government speech. COAST's theory ignores the relationship between government officials and private entities and the role private parties may play in formulating a government message.

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[35] *Miller*, 622 F.3d at 537. App A, 21a.

This Court stated very plainly in *Summum* that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[36] While COAST emphasizes the participation of third parties in two isolated uses of City Hall under old Administrative Regulation No. 5, this Court has been clear that private contribution does not transform government speech into private speech. When City officials express preferences in determining whether to collaborate with one group over another, they are ultimately accountable to the citizens of the City who may choose to vote them out of office. "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."[37]

City of Cincinnati officials may use the inside of City Hall for expressive activities without the federal judiciary imposing a "fairness doctrine." The district court and the Sixth Circuit erred by applying a First Amendment standard of review to Administrative Regulation No. 5. This Court should reaffirm that a government entity "is entitled to say what it wishes;" "to select the views that it wants to express;" and it "is *the very business of government to favor and disfavor points of view*."[38]

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[36] *Id.* at 1131

[37] *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

[38] *Summum*, 129 S.Ct. at 1131 (emphasis added).

Administrative Regulation No. 5, governing the use of the interior spaces of the City Hall workplace, provides an objective line in the law from which a person of ordinary intelligence could identify the applicable standard.

The Sixth Circuit declared the application of Administrative Regulation No. 5 to the City Hall *nonpublic* forum void for vagueness by relying upon an inapposite *designated* public forum decision. The Sixth Circuit further erroneously attributed subjectivity to the plainly objective standard, stating:

> The parties stipulate that the revised version of Administrative Regulation #5, as did the original, gives complete discretion to council members and department heads to select whom they will sponsor. The only direction provided is that the purpose of the interior of city hall is to allow City officials to 'exercise the rights and responsibilities specified in the Charter of the City of Cincinnati.' Without further specificity, this directive offers no meaningful guidance.[39]

The Sixth Circuit misapprehended and misapplied the void for vagueness standard set forth in *Grayned*,[40] *Finley* and *Ward*.[41] Contrary to the court's assertion, Administrative Regulation No. 5 provides clear, meaningful and sufficient guidance to City officials

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[39] *Miller*, 622 F.3d at 540. App. A, 27a.

[40] *Grayned*, 92 S. Ct. 2294.

[41] *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989).

and the public to discern an appropriate use of the interior spaces of City Hall.

The Sixth Circuit erroneously relied upon the inapposite *designated* public forum case, *UFCW Local 1099 v. SORTA.*, in support of its unprecedented facial application of the void for vagueness principle to a *nonpublic* forum.[42] *SORTA* itself relied upon *Grayned*, a traditional public forum case. Quoting *SORTA*, the Sixth Circuit expressed that the void for vagueness principle guards against the "danger of censorship." That is true for traditional public fora and designated public fora. The void for vagueness principle, however, is doctrinally inapplicable to a nonpublic forum like City Hall. There is no case law to the contrary.

A law governing *the conduct of the general public* may be void for vagueness if the law fails to give fair warning of what is prohibited, if it fails to provide explicit standards for the persons responsible for enforcement and thus creates a risk of discriminatory enforcement, and if its lack of clarity chills lawful behavior.[43] Administrative Regulation No. 5 regulates only the conduct of City of Cincinnati officials and not

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[42] The Federal Circuit Court of Appeals has expressed skepticism that First Amendment facial challenges are applicable to a nonpublic forum. *Griffin, et al. v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1321-24 (Fed. Cir. 2002) ("All of the modern cases in which the Supreme Court has set forth the unbridled discretion doctrine have involved public fora, and no Supreme Court case has suggested that the doctrine is applicable outside the setting of a public forum .").

[43] *Grayned*, 92 S. Ct. at 2294.

the general public (unlike the policies in *SORTA*[44] and *Finley*).[45]

In *SORTA*, moreover, the plaintiff facially challenged SORTA's prohibition of "controversial" advertisements if the advertisements adversely affected SORTA's image or ridership. SORTA also preferred advertisements that were "aesthetically pleasing."[46] In determining that SORTA's policy controlling private access to its *designated* public forum was impermissibly vague, the court found that the policy did not require a demonstrable causality between an advertisement's "controversial" nature and an adverse impact on SORTA's interests. The Court also determined that SORTA's "aesthetically pleasing" requirement similarly invited arbitrary or discriminatory enforcement because it was not susceptible to objective definition.

There are no similar ambiguities in the City's Administrative Regulation No. 5, a regulation controlling City officials' use of a nonpublic forum. The regulation provides objective, meaningful guidance to City officials and to the public regarding the limitation on City officials' use of their City Hall workplace. There are no terms within the regulation that are subjective or require a decisionmaker to speculate as to its meaning. The Sixth Circuit summarily concluded that Administrative Regulation No. 5 "offers no meaningful guidance." However, an

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[44] 163 F.3d 341 (6th Cir. 1998).

[45] 118 S. Ct. at 2168 (1998).

[46] 163 F.3d at 359-360.

official's "rights and responsibilities specified in the Charter" provides an explicit standard, draws a line between public and private use of City Hall by many types of City officials with different duties, and does not chill lawful behavior.

Further the Sixth Circuit's decision is conceptually inconsistent. The determination that Administrative Regulation No. 5 is both facially viewpoint neutral and void for vagueness is flawed with respect to First Amendment analysis. The void for vagueness determination can only mean that the regulation on its face is so subjective that it could be viewpoint discriminatory. The Sixth Circuit erroneously concluded that the City's regulation of the interior spaces of the City Hall workplace was void for vagueness.

CONCLUSION

Based on the foregoing, the petitioners submit that the reported decision of the Sixth Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts and involves an important federal question that should be settled by this Court. Accordingly, petitioners request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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